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**SUPREME COURT
OF THE STATE OF WASHINGTON**

**DONIA TOWNSEND and BOB PEREZ, individually, on behalf of
their marital community, and as class representatives; PAUL
YSTEBOE and JO ANN YESTEBOE, individually, on behalf of their
marital community, and as class representatives, VIVIAN
LEHTINEN and TONY LEHTINEN, individually, on behalf of their
marital community and on behalf of their minor children, NIKLAS
and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS,
individually, on behalf of their marital community and on behalf of
their minor children, COLTON and HANNAH,**

Petitioners,

vs.

**THE QUADRANT CORPORATION, a Washington Corporation;
WEYERHAEUSER REAL ESTATE COMPANY, a Washington
Corporation; and WEYERHAEUSER COMPANY, a Washington
Corporation**

Respondents.

**RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

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ORIGINAL

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I. INTRODUCTION

The issues raised by Amicus Washington State Association for Justice Foundation (“WSAJ”) are irrelevant to this appeal. In fact, WSAJ takes no position with respect to the central legal questions: (1) whether the Court of Appeals correctly concluded that the plaintiff children’s legal claims relate to the purchase and sale agreement (“PSA”) and are therefore subject to the arbitration clause contained in the PSA; and (2) whether the Court of Appeals correctly concluded that, under longstanding Washington state and federal law, the plaintiff Homeowners’ procedural unconscionability challenges to the PSA must be decided by an arbitrator.

Instead, WSAJ suggests, in the abstract, that tort claims are not subject to arbitration when those claims are wholly unrelated to any contracts containing arbitration agreements. Br. of Amicus Curiae WSAJ (“Amicus Br.”) at 7-11. That academic discussion is irrelevant and unhelpful when divorced, as it is, from the specific facts of this case. WSAJ also urges the Court to consider two issues not squarely presented on appeal: (1) whether a contract can be invalid for procedural unconscionability alone; and (2) whether courts considering the validity of an arbitration agreement must decide whether the parties have knowingly and voluntarily waived their rights to a jury trial. *Id.* at 11-16. WSAJ’s irrelevant legal arguments should not change the Court’s analysis of the issues presented on appeal,

and do not suggest that the Court of Appeals erred in compelling all claims in this action to arbitration.

II. ARGUMENT

A. Nonsignatory Plaintiffs, Like the Lehtinen and Sigafos Children, Are Rightfully Estopped from Suing on a Contract and, At the Same Time, Avoiding Its Arbitration Provision.

As WSAJ acknowledges, several legal theories, including estoppel, bind parties to arbitration clauses contained in contracts they did not sign. Amicus Br. at 8; *see also Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 811 n.22, 225 P.3d 213 (2009). Under Washington law, where a contract forms “the underlying basis” for a nonsignatory plaintiff’s claims, or where the claims “directly concern or arise from” the contract, the nonsignatory plaintiff is bound by the contract’s arbitration clause. *In re Jean F. Gardner Amended Blind Trust*, 117 Wn. App. 235, 239, 70 P.3d 168 (2003); *see also Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 896-97, 988 P.2d 12 (1999) (explaining that a nonsignatory plaintiff who bases his right to sue on a contract must also observe any arbitration provision in that contract). Courts in other jurisdictions articulate the same (or substantially similar) rule in slightly different ways. *See Supplemental Br. of Resp’ts* at 7-10.

A court can analyze the applicability of this well-established estoppel rule only by scrutinizing the bases for the nonsignatories’ legal

claims. WSAJ does not undertake that analysis. Instead, it simply suggests that the Court determine whether the plaintiffs' legal claims arise wholly independently from the PSA at issue, and, if so, hold that the nonsignatory children are not bound by the PSA's arbitration provision. Amicus Br. at 11. WSAJ thus takes no clear position on the central issue: whether the nonsignatory children's claims "directly concern or arise from" the PSA, or whether the PSA forms "the underlying basis" for the children's claims. *Gardner*, 117 Wn. App. at 239. As the Court of Appeals correctly held, all of the children's claims "relate to the PSA" and are therefore subject to arbitration. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 888, 224 P.3d 818 (2009).

WSAJ, like the Homeowners, fails to acknowledge that the children's claims for breach of warranty and rescission plainly arise from and directly concern the PSA. See Amicus Br. at 7-11. For example, the children (like their parents) allege that Quadrant breached implied and explicit warranties about the quality of the homes sold to the Homeowners. CP 762, 785. Alleged breaches of explicit warranties are indisputably matters of contract, and even the implied warranty of habitability "arises from the sale transaction," *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987), and is analyzed "under the law of contracts," *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d

380, 392, 241 P.3d 1256 (2010).¹ The children's claims for rescission also directly relate to the PSA because they explicitly demand "[r]escission of the contract of purchase and sale." CP 762, 785. The children's claims for breach of warranty and rescission thus do *not* arise from an independent tort duty wholly divorced from the PSA, and WSAJ would have concluded as much had it cared to analyze the claims *actually asserted* by the nonsignatory children.

Because the children assert claims that "directly concern or arise from" the PSA, they are bound by the arbitration provision contained in the PSA. *E.g., Gardner*, 117 Wn. App. at 239-40.² As the Court of Appeals correctly held, and as both the Homeowners and WSAJ acknowledge, those arbitration provisions are broad enough to encompass all claims asserted in this action. *Townsend*, 153 Wn. App. at 886-87; Amicus Br. at 7.

¹ The implied warranty of habitability also extends only to a home's "first intended occupant," so by asserting a breach of the implied warranty of habitability, the children are claiming to be initial purchasers just like their parents. *E.g., Stuart*, 109 Wn.2d at 415 (quoting *House v. Thornton*, 76 Wn.2d 428, 436, 457 P.2d 199 (1969)).

² The children are also required to arbitrate their claims because, for example, their claims are "intimately founded in and intertwined with the underlying contract obligations," *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984) (citations and quotations omitted); because they "fully join[ed] a party to the arbitration agreement's contract claims, making no distinction between the two," *In re Ford Motor Co.*, 220 S.W.3d 21, 24 (Tex. Ct. App. 2006) (citations and quotations omitted); because their claims "are derivative of and closely related to" the arbitrable claims made by their signatory parents, *Trimper v. Terminix Int'l Co.*, 82 F. Supp. 2d 1, 5 (N.D.N.Y. 2000); and because the children seek "direct benefits" from the PSA, *In re Weekly Homes, L.P.*, 180 S.W.3d 127, 134 (Tex. 2005).

Even if the children had not asserted contract-based claims, their tort and statutory claims also relate to the PSA and would therefore be subject to arbitration. *E.g., Gardner*, 117 Wn. App. at 236 (requiring arbitration of tort claims because the contract containing the arbitration provision formed the “underlying basis” for the tort claims); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 129 (Tex. 2005) (requiring arbitration of negligence claim because the plaintiff sued based on a contract that contained an arbitration clause broad enough to encompass the tort claim). For example, the children’s claim for fraud (asserted by parents and children alike) alleges that the Defendants made material misrepresentations about “the character and quality of Plaintiffs’ home,” and that, because of those misrepresentations, “Plaintiffs” (parents and children alike) “were induced to purchase and to continue to reside” in their home. CP 756, 779. That fraudulent inducement claim relates directly to the sales of the homes.

Similarly, the children’s statutory CPA claim alleges that the Defendants are guilty of “designing, producing, marketing, warranting, and selling Plaintiffs” (parents and children alike) a “Quadrant home when they knew, or should have known, the home construction violated applicable laws and building codes or” that the house was “defectively constructed.”

CP 757, 780. Those allegations, too, relate directly to the sales of the homes and the PSA.

The children's claims for negligence,³ outrage, and negligent misrepresentations are based on essentially the same allegations as the other claims and likewise "arise[] from the sale of the home," as the Court of Appeals correctly observed. *Townsend*, 153 Wn. App. at 888; *see also* CP 755-56, 759-61, 778-79, 782-84. It is thus unhelpful here to speculate about whether, in the abstract, "contractors may be liable in tort to those foreseeably sustaining personal injuries as a result of negligent acts or omissions, regardless of considerations of privity of contract." Amicus Br. at 9. In this case, all claims asserted by the Homeowner plaintiffs (parents and children alike) arise from the sales of the homes at issue, and are subject to arbitration because the PSA contained a comprehensive arbitration provision. The Court of Appeals should be affirmed.

B. The Homeowners' Procedural Unconscionability Challenge to the PSA is Reserved for Arbitration, so the Court Need Not Reach the Issues Raised by Amicus WSAJ.

In its discussion of procedural unconscionability, the WSAJ again sidesteps the central issue on appeal: whether the court or the arbitrator must decide the Homeowners' procedural unconscionability challenge to the

³ Washington law does not recognize a cause of action for negligent construction. *Stuart*, 109 Wn.2d at 417.

PSA. Amicus Br. at 14 (“Whether procedural unconscionability relates to the arbitration clause in particular or the contract in general involves a case-specific analysis of the record, a task beyond the scope of this amicus brief.”). As the Court of Appeals correctly concluded below, and as explained at length in Respondents’ briefing, the Homeowners’ procedural unconscionability allegations “relate to the PSA as a whole,” not to the arbitration clause in particular. *Townsend*, 153 Wn. App. at 886; *see also*, e.g., Appellant’s Answer to Resp’ts’ Mot. for Reconsideration (filed below) at 3-14. Accordingly, the Homeowners’ allegations must be considered by the arbitrator, not the court. RCW 7.04A.060(3).

Even though, in this case, the Court should not consider issues relating to procedural unconscionability, WSAJ urges the Court to clarify whether procedural unconscionability, standing alone, is sufficient to invalidate a contract. The Court, which explicitly reserved that issue in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d 773 (2004), need not decide that ancillary question here. Some states, like California, Oregon, and Idaho, require that a contract be substantively unconscionable, in addition to procedurally unconscionable, in order to be invalid. *E.g.*, *Carey v. Lincoln Loan Co.*, 203 Or. App. 399, 422-23, 125 P.3d 814 (2005) (Oregon); *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 191, 108 P.3d 332 (2005) (Idaho); *Armendariz v. Found. Health Psychcare*

Servs., Inc., 24 Cal.4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000) (California). Those states require substantive unconscionability even though, like Washington, they also recognize that procedural and substantive unconscionability are conceptually distinct. *Id.* Whether Washington should join those states is a question that is not extensively briefed in this appeal, and should be reserved for another day.

Nevertheless, even if the Court were to determine that procedural unconscionability alone is sufficient to invalidate a contract, it is especially critical that an arbitrator consider the procedural unconscionability challenge in this case. If a court were to find that the PSA is procedurally unconscionable, and therefore invalid, the court would simultaneously decide the merits of these actions (which, for example, involve claims for fraudulent inducement and rescission), usurping the role reserved by the parties for the arbitrator. *See* Supplemental Br. of Resp'ts at 13-16. The longstanding *Prima Paint* rule, codified at RCW 7.04A.060, exists to prevent that outcome. *See id.*

The Court should also decline WSAJ's request to conduct an additional "waiver" analysis when considering the validity of an arbitration clause. Amicus Br. at 14-16. As WSAJ acknowledges, that issue is not presented in this appeal. *Id.* at 14.

Regardless, arbitration clauses are analyzed under the rules of contract, not waiver. Washington's Uniform Arbitration Act is clear: "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable *except* upon a ground that exists at law or in equity for the revocation of *contract*." RCW 7.04A.060(1) (emphasis added). That provision is modeled on the Federal Arbitration Act, and federal law, like Washington law, reflects the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, --- U.S. ---, --- S. Ct. ---, --- L. Ed. 2d ---, 2011 WL 1561956, *5 (Apr. 27, 2011) (citations and quotations omitted). Accordingly, "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Id.* (citations omitted). Courts may not add an additional layer of "waiver" analysis not conducted for other contracts, *id.*, and not permitted by Washington's Uniform Arbitration Act, RCW 7.04A.060. The Court should continue the practice it established in *Adler*, and hold that where a party consents to an arbitration clause as a matter of contract, that party "implicitly waives his right to a jury trial." *Adler*, 153 Wn.2d at 360-61.

III. CONCLUSION

The Court of Appeals correctly compelled all claims in this action

to arbitration. None of the legal arguments in WSAJ's Amicus Brief suggests otherwise. The Court should affirm the Court of Appeals.

Dated this 6th day of May, 2011.

Respectfully submitted,

HILLIS CLARK MARTIN & PETERSON, P.S.

By



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Plaintiffs /
Respondents,

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THE QUADRANT CORPORATION,
a Washington Corporation;
WEYERHAEUSER REAL ESTATE
COMPANY, a Washington
Corporation; and WEYERHAEUSER
COMPANY, a Washington
Corporation,

Defendants /
Appellants.

NO. 84422-4

**CERTIFICATE OF
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I, Brenda K. Partridge, am a legal assistant for the law firm of Hillis Clark Martin & Peterson, P.S., 1221 Second Avenue, Suite 500, Seattle, WA 98101. I hereby certify that on the 6th day of May, 2011, I caused to be served via legal messenger true and correct copies of the *Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation* and this *Certificate of Service* on the following:

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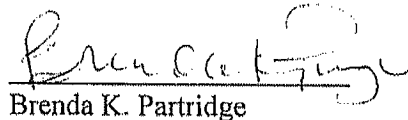
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of May, 2011 at Seattle, Washington.


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Attached are copies of the Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation and Certificate of Service in the above-referenced matter.

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